Service Date: December 16, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE COMPLAINT BY Colstrip Energy Limited Partnership against the Montana Power Company.	))))	UTILITY DIVISION DOCKET NO. D97.7.127 ORDER NO. 6017a
IN THE MATTER OF THE COMPLAINT BY Yellowstone Energy Limited Partnership against the Montana Power Company.	))))	UTILITY DIVISION DOCKET NO. D97.7.129 ORDER NO. 6018a
IN THE MATTER OF THE COMPLAINT BY The Montana Department of Natural Resources and Conservation against the Montana Power Company.	))))	UTILITY DIVISION DOCKET NO. D97.8.143 ORDER NO. 6019a

ORDERS ON RECONSIDERATION
ORDERS ON PETITIONS FOR DECLARATORY RULING

Introduction

On October 17, 1997 the Montana Public Service Commission (Commission) issued Final Order Nos. 6017, 6018 and 6019 in these Dockets.[1] These orders were in response to the question of whether the Commission has jurisdiction over complaints filed by Colstrip Energy Limited Partnership (CELP), Yellowstone Energy Limited Partnership (YELP) and the Montana Department of Natural Resources and Conservation (DNRC) against the Montana Power Company (MPC).[2] The Commission concluded that it does not have jurisdiction to hear the complaints.

[1] The orders are identical. For case management purposes each Docket has a separate order number.

[2] A complete introduction to the Dockets and description of the complaints is contained at paragraphs 1-3 of the Final Orders.

On November 13, 1997 CELP, YELP and DNRC filed motions for reconsideration of Order Nos. 6017, 6018 and 6019 and petitions for declaratory ruling. For the reasons discussed below the Commission denies the motions and petitions.

Motions for Reconsideration

DNRC

DNRC makes the following arguments in support of its position that the Commission should reverse itself and find jurisdiction over the DNRC complaint: 1) MPC's reply brief should not be considered because it was not contemplated by the procedural schedule and was filed out of time in violation of ARM 38.2.1208; 2) the Commission's Final Orders erroneously ascribe an intent on the part of the QFs to contract away Commission jurisdiction. DNRC contends it had no such intent and was forced by Commission rule to accept in contract certain curtailment conditions; 3) the Commission has a duty to determine what ARM 38.5.1903(l)(iii) means when a utility asserts that a "light loading" condition exists[3]; and the Commission has a similar duty as "overseer of the unique QF markets"; 4) public policy requires that the Commission hear the DNRC complaint because the State relied on Commission rule when obligating itself to $26 million in bonds to finance the Broadwater Power Project; and 5) one state agency (DNRC) cannot contract away the jurisdiction of another (the Commission).

First, the Commission concedes that the briefing schedule in these Dockets did not contemplate MPC's reply brief. It is not clear, as DNRC asserts, that ARM 38.2.1208 applies to a late filed brief, but the Commission finds it is not necessary to decide that question. In retrospect, whether it was a rule or a briefing schedule that MPC violated, the Commission should have provided the QFs an opportunity to respond prior to issuing the Final Orders. The remedy in this case, however, is not to strike MPC's brief or disregard its argument, but to give

[3] "Light loading" is described generally at ARM 38.5.1903(l)(iii), Final Orders, fn.5.

the QFs a chance to respond to MPC on reconsideration and to consider those responses carefully. This has been done.

Second, the Final Orders do not say that the QFs chose to contract away Commission jurisdiction. Rather, they say that the QFs chose to contract with MPC over the terms of "light loading" curtailment. It is the fact of the QF/MPC contracts over curtailment conditions, not whatever was intended by the parties to the contracts, that places these disputes in district court. This is the logic of the district court opinion, cited at fn. 3 of the Final Orders, finding the Commission without jurisdiction over executed QF/utility contracts pursuant to § 69-3-603, MCA. The district court opinion was issued after execution of the QF/MPC contracts, so, obviously, the QFs could not have known about it at the time of execution. But this chronology, unfortunate from the perspective of the QFs, does not change the answer to the jurisdictional question.

Third, Commission rule did not force either DNRC or the other QFs to enter into contracts over "light loading" curtailment. Federal law and state law set forth certain rights and obligations that govern the relations of QFs and utilities. The law also allows QFs and utilities to contract over rights and obligations that are different from those imposed by law. Nothing forced DNRC to contract with MPC over all terms and conditions governing "light loading" curtailment. DNRC could have relied on the terms and conditions provided by law. But having chosen to contract, DNRC is bound by the enforcement and jurisdictional consequences of its choice.

Fourth, it is true, as DNRC asserts, that the Commission would normally have an obligation to interpret its own rule. But at issue here is not a Commission rule, but a QF/utility contract. The fact that much (by no means all) of the contract language on "light loading" curtailment is nearly identical to the rule language is irrelevant. The question is: Does the rule control or does the contract control? In this case, in this context, the contract controls. In addition, the assertion that the Commission has jurisdiction over these complaints as "overseer of the unique QF markets" is not persuasive. In certain contexts the Commission may have a

general oversight role, but in this case the fact of the specific QF/MPC contracts controls the jurisdictional question.

Fifth, whatever increase in bondholder risk that exists has been created by MPC's curtailment or threats of curtailment not by action of the Commission. Bondholder risk is irrelevant to the jurisdictional question at hand. Increased risk to bondholders cannot support jurisdiction in the Commission where there is none. The question presently before the Commission is who should decide whether the MPC action that ostensibly created increased risk is legal. It may be less convenient, less expeditious and more cumbersome to determine the legality of MPC's actions in court, but there is no necessary reason why a court cannot give DNRC the answer it wants, and thus provide greater security to bondholders, any less than the Commission.

Finally, the Commission agrees that one state agency cannot contract away the jurisdiction of another. But that is not what happened. DNRC did not contract with MPC over jurisdiction. Rather, it contracted over the terms of "light loading" curtailment. It is the fact that DNRC and MPC contracted over those terms and conditions that shifts jurisdiction.

CELP/YELP[4]

CELP/YELP argue the Commission should change its mind on the jurisdictional question because the Commission has an obligation, independent of contractual rights, to verify that a light loading period has occurred. CELP/YELP cite to CFR § 292.304(f)(4) that the "claim by [MPC] that [a light loading period] has occurred or will occur is subject to verification by its State regulatory authority as the State regulatory authority determines necessary or appropriate, either before or after the occurrence." CELP/ YELP state that they are not asking the Commission for relief if it finds that a "light loading" period did not occur. Rather, they state they would take such a finding to court. CELP/YELP also claim that the Final Orders interpret the QF/MPC contracts while disclaiming the jurisdiction to do so. They state that "if the [Commission] . . . truly lacks authority to interpret executed contracts . . . it should not concern itself with the terms

[4] CELP/YELP filed separate motions but they contain identical arguments.

of those contracts." Motion of CELP/YELP, p.4. Finally, CELP/YELP argue that, although they may have waived the applicability of ARM 38.5.1903(l)(iii) to some extent in their contracts, they did not do so with respect to the conditions that permit "light loading" curtailment.

The argument that CFR § 292.304(f)(4) imposes an obligation on the Commission, independent of contract, to determine whether a "light loading" period has occurred, is not consistent with the plain language of that rule. The rule states that verification is "as the State regulatory authority determines necessary or appropriate." It is not necessary for the Commission to assert jurisdiction over this dispute because there is a remedy in court. It is not appropriate for the PSC to assert jurisdiction because the legislature, as determined by the district court, has said the Commission has no jurisdiction over executed contracts. In addition, CELP/YELP's statement that they do not ask the Commission for any relief is a concession that a complaint procedure is not the appropriate remedy. It is the very nature of a complaint to seek a remedy. (A complaint is "the pleading which sets forth a claim for relief." Black's Law Dictionary, 5th Ed., 1979.)

Contrary to the contention of CELP/YELP, the Commission did not interpret QF/MPC contracts in its orders. Rather, the orders simply recognize that the QF/MPC contracts contain terms and conditions covering "light loading" curtailment. There is a difference between reading and interpreting a contract. It was not necessary for the Commission to interpret the QF/MPC contracts in order to reach its decision on jurisdiction.

Finally, the Commission did not conclude that the QFs waived Commission jurisdiction by entering into the contracts with MPC. "Waiver is the voluntary, intentional relinquishment of a right." McGregor v. Cushman/Mommer, 220 Mont. 98, 110, 714 P.2d 536, _____ (1986). At the time the QFs executed their contracts with MPC they could not have known that contract disputes would not be jurisdictional at the Commission. The QFs could not have intentionally relinquished something -- a Commission interpretation of their contracts -- before they knew there was anything to relinquish. The shift of jurisdiction over QF/utility contracts from the

Commission to the district court is a result of judicial interpretation and legal happenstance, not of an "intentional relinquishment of a right." Therefore, waiver is not an issue.

Petitions for Declaratory Ruling

CELP/YELP/DNRC

In the event the Commission does not change its mind about jurisdiction to hear the complaints, each QF has, in the alternative, asked for a declaratory ruling that MPC's curtailment was a violation of ARM 38.5.1903(l)(iii). The relevant law on declaratory rulings is as follows: "Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency." § 2-4-501, MCA. The Attorney General's Model Procedural Rules, adopted by the Commission at ARM 38.2.101, further define a declaratory ruling: "A person taking or wishing to take a particular action may be unsure whether an agency regulation or a statute administered by an agency applies to that action. [Such person] may petition for declaratory ruling pursuant to § 2-4-501, MCA." ARM 1.3.226.

The Commission is not required to issue a declaratory ruling on request, although if it declines to issue a ruling it must provide a statement of reasons. § 2-4-501, MCA, and ARM 1.3.228(2). The criteria for deciding whether to issue a declaratory ruling are not defined precisely in Montana law; but the Commission believes it has considerable flexibility, taking into account the underlying purpose for declaratory rulings and sound administrative practice, when deciding whether to issue a declaratory ruling. For the following reasons the Commission finds that in this instance it is inappropriate to issue a declaratory ruling.

First, based on the law quoted above and the Commission's general understanding, declaratory rulings are supposed to be mechanisms for resolving uncertainty before a dispute arises. Here, MPC has taken an action and created a dispute. An actual dispute is more logically resolved through a complaint or other mechanism that seeks a remedy. Second, declaratory rulings are generally based on given or assumed facts. Here, the facts are very much at issue and

would have to be determined through some kind of evidentiary proceeding prior to interpreting the Commission rule. The Commission has on occasion conducted evidentiary proceedings as part of a declaratory ruling process, but finds that this case, for all the reasons here explained, does not warrant an exception to the general rule. Third, the petitions for declaratory ruling are clearly pleadings to resolve a complaint masquerading in another form. It would be more than a little disingenuous of the Commission to conclude that it lacks jurisdiction over a complaint and then turn around and agree to begin a process that will effectively lead to a decision on the very matter over which it disclaimed jurisdiction. Finally, although the Commission recognizes the earnest desire on the part of the QFs that it should speak on the merits of the MPC curtailment, it is inefficient for the Commission to go through a process that will be repeated, *de novo*, in district court.

CONCLUSIONS OF LAW

1. The Commission generally does not have jurisdiction to decide disputes between utilities and QFs over the terms and conditions of executed contracts. § 69-3-603, MCA.

2. Utilities and QFs generally may agree to terms and conditions related to the purchase of power that differ from terms and conditions otherwise required by rule. 18 CFR § 292.301(a)(b)(1) and ARM 38.5.1903(l)(iii).

3. The Commission may refuse to grant a petition to issue a declaratory ruling. § 2-4-501, MCA and ARM 1.3.228(2).

Orders

For the reasons stated above the Commission denies the motions for Reconsideration of Order Nos. 6017, 6018 and 6019. For the reasons stated above the Commission declines to issue declaratory rulings on the petitions of Colstrip Energy Limited Partnership, Yellowstone Energy Limited Partnership, and the Montana Department of Natural Resources and Conservation.

DONE AND DATED this 11th day of December, 1997 by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
DAVE FISHER, Chairman

_____
NANCY MCCAFFREE, Vice Chair

_____
BOB ANDERSON, Commissioner

_____
DANNY OBERG, Commissioner

_____
BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this matter. Judicial review may be obtained by filing a petition for review within thirty (30) days of the service of this order. Section 2-4-702, MCA.